1956

State of Utah v. Clyde Arnold Weldon : Brief of Appellant

Utah Supreme Court

Cline, Wilson & Cline; Attorneys for Appellant;

In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

CLYDE ARNOLD WELDON,
Defendant and Appellant.

No. 8561

BRIEF OF APPELLANT

ON APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR IRON COUNTY

HON. WILL L. HOYT, *Judge*

CLINE, WILSON & CLINE,
Attorneys for Appellant.

INDEX

STATUTES AND CASES CITED

In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

CLYDE ARNOLD WELDON,
Defendant and Appellant.

No. 8561

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This case is before this Court on appeal from a judgment of the District Court of the Fifth Judicial District of the State of Utah, in and for Iron County, finding the defendant guilty of the crime of conspiracy to commit robbery. The case was tried before the court, a jury having been waived by the defendant.

The information was filed against two defendants, Robert Clayton Harke and Clyde Arnold Weldon. Prior

to trial, the court dismissed the action as against Harke, hence Weldon is the sole defendant in the case.

On June 6, 1956, the County Attorney of Iron County filed an amended complaint before a Justice of the Peace charging the crime of conspiracy to commit robbery. After a preliminary hearing the defendant was bound over to the District Court, a jury was waived by the defendant, the case was tried, and the trial court entered the judgment heretofore noted.

The defendant introduced no evidence in his defense.

The judgment of the trial court finding the defendant guilty of conspiracy to commit robbery was entered notwithstanding—

(1) Prior to the introduction of any evidence the District Attorney prosecuting the case stated in open court that "there is not a prima facie case against the defendant. I don't believe there is a prima facie case * * *" *(Tr. 2)*.

(2) Prior to the introduction of any evidence he further stated that "We have no proof of the overt act going to the conspiracy, no evidence that this defendant intended to use the item." *(Tr. 3)*. (He was referring to a gun).

(3) When the State rested the District Attorney stated, "About all I would care to say at this time is that in my opinion the State has failed in its duty to prove a prima facie case." *(Tr. 23)*.

STATEMENT OF FACTS

The only evidence introduced by the State was the testimony of Jack F. Miller, a police officer of Cedar City, Utah, and Exhibit "A" introduced by the State which purported to be a written confession signed by the defendant.

Officer Miller testified substantially as follows:

That on May 15th, 1956, shortly after midnight, he went to the Cedars Hotel in the company of a man named Robinson; that the defendant and Harke were lying on the same bed inside a hotel room with the door into the hallway wide open *(Trans. 7-8)*; that Officer Miller knocked on the door, and after being given permission, walked into the room and asked the names of the men, where they were from, what they were doing and if they would go to the police station. *(Tr. 8)*.

They saw a gun lying on the bed beside Harke and Weldon told them that his gun was in his jacket across the room on the back of a chair. Both guns were loaded. The officer took possession of the guns. *(Tr. 8)*.

The four men went to the Cedar City police station, where the officer talked with Weldon and Harke together and then Weldon separately. *(Tr. 9)*.

Weldon made various admissions *(Tr. 10-13)* respecting a planned robbery the next morning of Safeway Store in Cedar City, to which testimony defendant ob-

jected *(Tr. 11-14)*. He signed a confession *(Tr. 15)*.

Respecting the confession (Ex. 1) the witness testified that the man Robinson told the defendant that he didn't have to sign a statement or confession and that if he did, it would be voluntary *(Tr. 15)* and that there were no promises held out, etc., *(Tr. 16)*, but the witness was not in the room at all times. He stated that he was not present in the room at the police station at the specific times when the defendant was being questioned by Robinson and an Officer Hoyt; that he had to leave the office to answer two or three telephone calls, and on another occasion was called out for a short time. *(Tr. 18)*.

STATEMENT OF ERRORS RELIED ON

For a reversal of the judgment of the trial court finding the defendant guilty, the defendant relies on the following errors of the trial court:

1. The trial court erred in admitting the written and oral confession of the defendant for the following reasons:

   (a) The corpus delicti was not sufficiently established. Independent of the confession, there is no proof whatever that the defendant conspired to commit the crime charged, or any crime.

   (b) The State did not prove the confession was prima facie voluntary.

II. Even though there had been a plan to commit a

robbery as charged in the information (but no plan was proved) there was no overt act in furtherance thereof.

While it may seem out of order, the appellant believes it will prove more logical to discuss the points above raised out of the above order so that Point I (a) will be argued first, Point II second, and Point I (b) last.

ARGUMENT

I(a)

The trial court erred in admitting the confession of the defendant because the corpus delicti was not sufficiently established. Independent of the confession, there is no proof whatever that the defendant conspired to commit any crime whatever, much less the crime charged in the information.

Let us re-examine the proof of the State, deleting any information supplied by defendants' confession (Ex. 1). A police officer and another man went to a hotel room, the door to which was wide open *(Tr. 7-8)*. They found two men on a bed. A loaded gun was on the bed. The defendant had a loaded gun in his jacket which was across the room *(Tr. 8)*. The two men did not object to and voluntarily accompanied the police officer to the police station *(Tr. 9)*.

That is the sole independent proof of the commission of a crime. Defendant has combed the record to find any evidence additional to the above. There is none.

What crime do those facts show? We submit, none whatever.

There is neither independent proof of any crime nor the particular crime charged. There is no independent evidence of any planned robbery, or any plan to rob Safeway Store, or any plan to rob Robert Childs, individually or as the assistant manager of Safeway Store. There is not even any evidence that there was such a person as Robert Child, much less that he was the assistant manager of Safeway Store. There is not even any evidence that there is a Safeway Store in Cedar City or Iron County or in the State of Utah. There is absolutely no evidence of any overt act necessary to constitute the offense of conspiracy.

It is the ordinary rule of law, adhered to by this Court, that the confession of an accused person is not sufficient to establish the corpus delicti of the offense.

This Court has held to that effect in too many cases to require argument.

The doctrine enunciated by this Court in *State v. Johnson*, 95 Utah 572, 83 Pac. 2d 1010, at page 1014, has since been followed, and we quote pertinent portions:

> "We adhere to the general doctrine that there must be independent proof of the corpus delicti before the confession can be received for the consideration of the jury * * *. The rule we deduce from the way it is applied in the overwhelming majority of the cases is that there must be evidence, independent of the confession, corroborative thereof, consistent therewith, forming a basis or foundation

> for the confession, and tending to confirm and strengthen it, before the confession may be considered by the jury as evidence of guilt. * * * But the law for reasons which immediately appear has wisely declared that there must be independent evidence of the first and second points, commonly called the corpus delicti."

Defendant contends strenuously that there is not one scintilla of evidence that defendant conspired to commit any crime, unless lounging in a hotel room with a loaded gun can be considered a conspiracy to commit the crime of robbery.

Following the Johnson case is that of *State v. Ferry*, 2 Utah 2d 371, 275 Pac. 2d 173, wherein the Court tersely said:

> "An accused cannot be convicted on his confession alone. We believe and hold that in addition there must be independent, clear and convincing evidence of the corpus delicti, although we and the authorities generally do not require it to be convincing beyond a reasonable doubt."

II.

Even though there was a plan to commit robbery as charged in the information, the defendant committed no overt act.

The defendant was charged under *Section 76-12-1, U. C. A.*, which defines criminal conspiracy (so far as pertinent to this case): "If two or more persons conspire (1) To commit a crime."

Section 76-12-3 provides as follows:

> "Act Besides Agreement Necessary. — No agreement, except to commit a felony upon the person of another or to commit arson or burglary, amounts to a conspiracy, unless some act, besides such agreement, is done to effect the object thereof by one or more parties to such agreement."

In short, there must be some overt act where the defendant is charged with conspiracy to commit robbery. Where is the evidence establishing that overt act? What overt act? The closest the State came to proving an overt act, and we state it at the risk of being repetitious, was that the defendant and Harke were lounging in a hotel room with a loaded gun. This falls far short of proving even an intention to rob the assistant manager of Safeway Store, or Safeway Store, much less any overt act in furtherance. Defendant nor anyone else planning a robbery made the slightest move towards the store.

> "Other than agreements to commit certain felonies which require no over acts, an unlawful agreement as defined in Section 103-11-1, U.C.A., 1943, does not amount to conspiracy according to the specifications of Section 103-11-3, 'unless some act, besides such agreement, is done to effect the object thereof by one or more of the parties to agreement.' Thus, a criminal conspiracy essentially consists of an unlawful agreement PLUS SOME OVERT ACT OR ACTS DONE TO FURTHER OR ACCOMPLISH THE OBJECTIVE OF SUCH AN AGREEMENT." *State vs. Musser, et al.*, 175 Pac. 2nd 724, at page 731, 110 Utah 534.

Sections 76-12-1 and 76-12-3, U.C.A., 1953, are identical with *Sections 103-11-7* and *103-11-3, U.C.A. 1943.*

This rule is so overwhelmingly adopted by the Courts that defendant sees no purpose in citing additional authority, the above case having never been overruled.

I (b)

The trial court erred in admitting the confession of the defendant because the State did not prima facie prove the confession was voluntary.

The burden of proof is on the State. The rule respecting the voluntariness of confessions is well stated in *State v. Wells,* 35 Utah 400, 100 Pac. 681, at page 683:

> "We are therefore of the opinion that, when evidence of the defendant's confession is offered by the state, it, on the defendant's objection, must first introduce some evidence tending to show that the confession was voluntary; that it is alone within the province of the jury to determine, not whether the confession was or was not voluntary, but whether a sufficient prima facie showing, with respect to its voluntariness, is made to warrant a finding that it is voluntary; that, before the court rules upon the question, the privilege should be given the defendant, if he requests it, to cross-examine the witness, or witnesses, by whom the state seeks to show the voluntariness of the confession; that when such showing has been made, and the court determines that it is prima facie sufficient to authorize such a finding, then the court should admit the confession * * *."

This Court therefore holds that the State must make a prima facie showing that the confession is voluntary and then, as stated by this Court in the Wells case, "the privilege should be given the defendant, if he requests it, to cross-examine the witness or witnesses, by whom the State seeks to show the voluntariness of the confession * * *"

But in the case at bar, the witnesses necessary to prove the voluntariness of the confession were not in court, and so cross-examination was unnecessary. The defendant did not choose to cross-examine the only witness produced because the State had not made even a prima facie showing to that point. It is further observed that the only witness produced might well have been truthful and still the confession not have been voluntarily made because the witness was not present during the entire period. This Court will recall that the witness was called out of the room on three or four occasions for varying periods; for how long, the record does not disclose. During his absence the defendant might well have been threatened, given false promises or inducements or whatnot. The officers remaining in the room were not produced by the State to make a prima facie showing. They were not available to be cross-examined.

True, the trial court attempted to shift the burden to the defense by saying:

"THE COURT: At the defendant's request the court

will require that those other officers be in attendance before the conclusion of the trial." *(Tr. 19).*

"MR. CLINE: Was the court's statement directed to the defendant?

"THE COURT: Yes. In other words, if you desire to question them as to any circumstances. *I assume this witness and the other officers were present during the questioning or conversation with the defendant.* If this witness was not present, if it is the desire on the part of counsel for the defendant to question the other witnesses either on voir dire —that is, as if they were being questioned on voir dire before the court admitted this exhibit, the court will require that they be produced." *(Tr. 19).*

"THE COURT: *It was admitted on the assumption that we would have the testimony of a witness who was present at all times during the questioning of the defendant." (Tr.19).*

"THE COURT: What the court was endeavoring to get at was, if there is any claim that the statements by the defendant were not voluntarily made, then the court should have all the evidence available as to the voluntariness of this statement, or the statement, the oral statements made by the defendant before this written statement was signed. *If there is no request for further proof on the part of the state, that is, to require the state to prove the voluntariness of this statement or the preceding oral statements, then the present ruling will stand. I think we should have the other officers present." (Tr. 19-20).*

The trial court *assumed* that the witness and the other officers were present during the questioning, and

then indulged in the unique position that *he would assume the confession was voluntary unless the defendant insisted upon the State proving it.* In short, the trial court ruled, in effect, that unless the defendant indirectly produced the State's witnesses, he would assume they would testify favorably and prove that the confession was voluntary. Defendant does not believe this Court will so hold.

Further, the confession was admitted "on the assumption that we would have the testimony of a witness who was present at all times during the questioning of the defendant." We believe such an assumption unique in criminal practice. But even so, no such witness or witnesses were produced, yet the trial court itself attempted to supply the lack of proof by ruling that unless the defendant requested the State to supply the proof he would assume it was proved.

As a matter of fact, too, the confession had already been admitted.

True, the court said it would require the attendance of the other officers "at the defendant's request" and "if you desire to question them" and "if it is the desire on the part of counsel to question the other witnesses," etc. The court also added that if the defendant did not request the State to make further proof, "that is, to require the State to prove the voluntariness" the confession would be admitted.

Defendant submits that it is not his duty to request or require the State to prove its case; to demand additional witnesses to be produced by the State or the trial court to prove the State's case. Defendant submits that he does not waive any rights by not calling the State's attention to its lack of proof, and that the burden of proof cannot be shifted because a trial court arbitrarily states in open court, in effect, "If you don't think the prosecution has proved a case, you must make your objection so additional proof can be submitted, and unless you do demand additional proof I will hold that the proof has been produced." That is not the law and would certainly establish a unique rule or method of procedure.

CONCLUSION

Defendant believes that the District Attorney was correct and commendably honest and frank in stating in open court that he could not prove a prima facie case and at the conclusion of his case further stating that "the State has failed in its duty to prove a prima facie case."

The attitude of this Court is well expressed,

> "Our traditional zeal in safeguarding the rights of an accused person would preclude conviction on such an unsubstantial basis." *State v. Ferry*, 2 Utah 2d 371, 275 Pac. 2d 173, at page 174.

This case clearly qualifies itself for an order of this

Court reversing the judgment of the trial court with instructions to grant defendant's motion to dismiss.

Respectfully submitted,

CLINE, WILSON & CLINE,
Attorneys for Appellant.